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No. 90-1399

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SOUTHERN LIFE AND HEALTH INSURANCE COMPANY and RICHARD PERRY,

Petitioners,

v.

LUCY R. TURNER,

Respondent.

REPLY MEMORANDUM

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Respondent does not, as she cannot, suggest that this case presents anything less than a runaway jury. Indeed, she documents, perhaps unwittingly, the fact that another jury in the same judicial district recently returned an identical $5,000,000 punitive damage verdict in an insurance fraud case after a trial presided over by the same judge who tried the case at bar, Br. in Opp., at 5 (citing *State Farm Mutual Automobile Insurance Co.* v. *Robbins*, 541 So. 2d 477 (Ala. 1989)). That judge, for reasons left largely unarticulated in both cases, has apparently concluded that, in his courtroom, insurance fraud resting upon nothing more than a jury's *post hoc* determination to accept the testimony of the insured and to reject that of the insurer's agent will bring at least a half-million dollar punishment. Reducing a punitive damage award by

$4,500,000 on the basis of a highly subjective, "gut" reaction to the sheer size of an inflamed jury's verdict may leave a few misguided trial judges feeling as if they have made a contribution to the rule of law. Such actions, however, cannot be mistaken for constitutional due process under anything but the most crabbed notion of fundamental fairness.

1. Respondent argues, Br. in Opp., at 6, that the jury's $5,000,000 verdict sent a "message" to Southern Life and other insurers. It is difficult to understand that message as anything other than a warning that, in Alabama, a policyholder who arouses the sympathies of a jury is likely to become an instant multimillionaire at the expense of its insurer and, indirectly, at the expense of the other policyholders whose premiums will inevitably rise to fund the punitive damage lottery. According to respondent, the trial court granted "reasonable deference" to that message. Respondent would, however, undoubtedly be making the same argument if the punishment had been reduced by $500,000 rather than $4,500,000, and the argument would have equal force because the concept of "reasonable deference" is as meaningless as it is subjective. Certiorari should be granted to allow this Court to explain to the courts of Alabama and other jurisdictions how objective factors, such as the relationship between a punitive damage award and the highest statutory fine imposable for similar conduct, should be weighed in the constitutional balance where an award is 499 times greater than both the available statutory fine and the compensatory damages.

2. Respondent attempts to justify the refusal of the Supreme Court of Alabama to explain the basis for

its affirmance of this $500,000 punishment by invoking the notion that " 'judges are presumed to know the law and to apply it,' " Br. in Opp., at 6 (quoting *Walton* v. *Arizona*, 110 S. Ct. 3047, 3057 (1990)). There are two responses to this argument. First, when this case was decided below before *Pacific Mutual*, the Alabama courts were unaware of, and had in fact firmly rejected, the proposition that the *Hammond/Green Oil* factors are constitutionally compelled. Second, *Walton* involved a decision whether to impose a death sentence to be made not by a jury but by a judge who performed that important function subject to elaborate statutory guidance and constraints. No such guidance or constraints are applicable to this case or to punitive damage cases in many other jurisdictions. Indeed, that part of Justice White's opinion for the Court in *Walton* relied upon by respondent here makes precisely the point that Southern Life now urges on the Court: "[E]ven if a trial judge fails to apply [the law correctly] . . . , a state appellate court may itself [apply the law correctly]." *Id.* In contrast, in civil punitive damage cases the jury has virtually unfettered discretion to punish in any amount—where the only control over impassioned juries comes through the process of judicial review. Thus, the need for careful appellate review is heightened. If, as this Court recently held in *Salve Regina College* v. *Russell*, No. 89-1629 (Mar. 20, 1991), the federal appellate courts are required to review *de novo* and to articulate the basis for their resolution of difficult

issues of state law,[1] it is *a fortiori* that meaningful implementation of the constitutionally compelled process announced in *Pacific Mutual* demands reasoned judicial explanations from the courts who impose or affirm such punishments in particular cases.[2] The Court should grant certiorari to consider whether judicial silence is a sufficient basis upon which to affirm a punitive damage award that is vastly disproportionate to the highest statutory penalty available for similar conduct and the actual damages suffered by the plaintiff.

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[1] As the Court stated in *Salve Regina*, slip op., at 7:

> If the court of appeals finds that the district court's analytical sophistication and research have exhausted the state-law inquiry, little more need be said in the appellate opinion. Independent review, however, does not admit of unreflective reliance on a lower court's inarticulable intuitions.

In the case at bar, a $500,000 punishment has been imposed on the basis of unarticulated judicial review of an unconscionable jury verdict.

[2] The principle that judges should articulate the basis for the punishments they impose is not a novel one. Under federal sentencing law, a district court "shall state in open court the reasons for its imposition of the particular sentence" and otherwise provide a "public record" of those reasons. *See* 18 U.S.C. § 3553(c). If the received wisdom is that sentencing judges who operate within carefully circumscribed guidelines and limits must articulate the basis for and reasoning behind punishments they mete out, the necessity that they do so when imposing punishment in the complete absence of stringent guidelines and statutory maxima is self-evident.

April 12, 1991

Respectfully submitted,

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